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In the Supreme Court of the United States

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OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

vs.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

Brief of the State of California Amicus Curiae, in Support of Petition

THOMAS C. LYNCH
Attorney General
6000 State Building
San Francisco, California

ELIZABETH PALMER
Deputy Attorney General
6000 State Building
San Francisco, California

Attorneys for the State of California, Amicus Curiae

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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The State of California, as amicus curiae, respectfully supports the petition of Mark Wendell Painter, a minor, by Harold W. Painter, his father and next friend, praying that a Writ of Certiorari issue (hereinafter referred to as "petition") to review the judgment of the Supreme Court of Iowa entered February 8, 1966, rehearing denied June 13, 1966.[1] For Opinions Below, Jurisdiction, Questions

1. With the permission of the Supreme Court of Iowa the State of California filed an amicus curiae brief on behalf of petitioner herein in support of the petition for reconsideration of that court's decision of February 8, 1966. The State of California also filed an application for leave to intervene as plaintiff-appellee. The order denying rehearing made no reference to the application. (R. 938)

Presented, Constitutional and Statutory Provisions involved and Statement of the case, see the petition.

INTEREST OF THE STATE OF CALIFORNIA

The interest of the State of California in what might appear to be purely private litigation is substantial. California is the unquestioned and unquestionable state of domicile of Harold Painter's son, Mark. Cal. Gvt. Code § 233(d); *Smith v. Smith*, 45 Cal. 2d 235, 288 P.2d 497 (1955); *Yarborough v. Yarborough*, 290 U.S. 202, 211 (1933); Restatement, *Conflict of Laws* § 30 (1934). The State of California has a legitimate interest in the welfare of its domiciliaries and the preservation of their families.

Large numbers of Californians have family ties to other states. Only 43.7 per cent of the Californians counted in the 1960 census were born in California.[2] Net migration to California from the other states and the District of Columbia in the period 1955-60 totaled 1,122,204 persons. (Appendix A, *infra*). If the decision below stands, California citizens with family ties in sister states will face the risk of losing the custody of their children through no fault, defect or wish of their own where, because of family tragedy, they act for the welfare and best interests of the children by leaving them temporarily with out-of-state relatives.

As we shall show in our argument below, those Californians have a justifiable expectation, founded upon the law of their own state, that their families will in the normal and natural course be reunited if they are fit parents —that they need not prove to the satisfaction of a judge or group of judges or other officials that their child will

2. U.S. Bureau of the Census, U.S. census of population: 1960. Vol. 1, characteristics of the population. Part 6, California, Table 98, page 6-483.

be better off with them than with the relatives who have had him in their temporary care. Under accepted conflict of laws rules, recognizing the primary interest of the state of family domicile, this rule of California law should have been applied in this case. It was not.

It is for these reasons that the State of California joins petitioner in asking that the writ be granted and in urging this Court to render a prompt and final determination of the constitutional issues raised in this case.

ARGUMENT

I. The Right of a Fit Parent, Who Has Not Abandoned His Child and Who Can Give the Child an Adequate Home, to the Custody of His Child in Preference to a Stranger and the Right of the Child to Be in the Custody of His Parent Are Fundamental Rights Protected by the Constitution of the United States.

This Court has declared that there are fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment of the United States Constitution from impairment by the States. *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965). Among those personal rights and liberties held to be protected from governmental intrusion are: the right of marital privacy, *Griswold v. Connecticut, supra;* the right to direct the upbringing and education of one's children, *Pierce v. Society of Sisters,* 268 U.S. 510, 534 (1925); the right to marry, establish a home and bring up children, *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); the right to custody, care and nurture of one's child, *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); the right to pursue an occupation, *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957); freedom of speech and of the press, *Gitlow v. New York,* 268 U.S. 652, 666 (1925); freedom to associate and

privacy in such association, *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462 (1958). This Court further declared in *May v. Anderson,* 345 U.S. 528, 533 (1953) that the right to custody of one's child is far more precious than property rights.

The Court has not hesitated in the foregoing cases and others cited by petitioner to find that certain rights are so fundamental that they are included in the conception of due process of law and entitled to protection from invasion by State action.

In *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954), it was stated, "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for proper governmental objective."

The State of Iowa through its highest court has deprived Mark Wendell Painter and his father of the very liberties recognized by that court only a year ago in *Stubbs v. Hammond,* 135 N.W. 2d 540, 543 (Iowa 1965).The Iowa Supreme Court then held, "The right of a child to the care, support and affection of his parents, and the right of parents to have custody of their child and furnish him care, support and affection are inherent constitutionally protected liberties," citing *Pierce v. Society of Sisters,* 268 U.S. 510.[3]

In this case although the court below found the father to be fit,[4] that he had placed his child with the maternal

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3. To the same effect: *Watters v. Watters,* 243 Iowa 741, 744, 53 N.W.2d 162, 163 (1952); *Joiner v. Knieriem,* 243 Iowa 470, 479, 52 N.W.2d 21, 26 (1952); *Wooley v. Schoop,* 234 Iowa 657, 660, 12 N.W.2d 597, 599 (1944); *Van Auken v. Wieman,* 128 Iowa 476, 104 N.W. 464 (1905).

4. The record will show that the Social Services Department of the County of Contra Costa, State of California, at the request

grandparents on a temporary basis out of sheer necessity, and that he had not abandoned him, it nonetheless reversed the trial court and awarded permanent custody of this boy, now eight years old, to the grandparents.

Despite the court's disclaimer (Petition App. B, p. 5a) the conclusion is inescapable that the judgment was based wholly on the court's preference for "a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it."[5]

In assessing the relative merits of the two homes the court found "It [the Bannister home] provides a solid foundation and secure atmosphere. In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable." (Petition, App. B, p. 5a). "We believe [the kind of life Mark would be exposed to in the Painter household] would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating. . . . We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child." (Petition, App. B, p. 8).

In "Standards for Juvenile and Family Courts" (U.S. Department of Health, Education, and Welfare, Children's Bureau Publication No. 437-1966 prepared in cooperation with the National Council on Crime and Delinquency and the

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of the Department of Social Welfare of the State of Iowa made a study of the Painter home and reported that the home was adequate in size, in good repair, and should be comfortable and pleasant for the boy. (C.T. Ex. I).

5. Educational opportunities do exist in California. The 1964 total enrollment in California's 179 Institutions of higher education was 667,902. U.S. Bureau of the Census, Statistical Abstract of the United States: 1965. (86th ed.) Table No. 182, page 132.

National Council of Juvenile Court Judges) the mutual rights of parents and children are given far greater regard and protection than that given by the court below despite the fact that the Juvenile Court is concerned with neglected or delinquent children, a far cry from the factual situation presented here. At pages 4-5 of the "Standards for Juvenile and Family Courts" it is stated:

> "In proceedings on behalf of children, basic rights of both parent and child are involved. The rights of parents to care for their children and to exercise their discretion in meeting the needs of their children are basic to our society. Equally basic are the rights of children to maintain their personal liberty from other than parental or normal community restraint, to live with their parents, and to have someone legally responsible for protecting their interests. The behavioral sciences, in emphasizing the importance to a child of his own parents, have further confirmed what tradition, religion, and common sense have long accepted as true.[6]

II. It Is the Law of California That a Fit Parent Who Has Not Abandoned His Child and Who Can Give the Child an Adequate Home Is Entitled to Custody in Preference to a Non-Parent.

The law of California likewise emphasizes "the importance to a child of his own parents" and thus recognizes the teaching of "tradition, religion, and common sense"—and of the United States Constitution. Under California law there is no room for depriving a fit parent, who has not abandoned his child, of custody of the child in favor of strangers.

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6. *Contra,* Glenn R. Hawkes, Ph.D., the child psychologist on whose testimony the Court below placed "a great deal of reliance" (Petition, App. B, p. 9a). The trial court expressly discounted Dr. Hawkes testimony (Petition, App. C, p. 19).

This is the law that, according to accepted rules of the conflict of laws, should have been applied by the Iowa courts in this case. As we have said, Mark Painter is a California domiciliary because of the California domicile of his father.[7] (*Supra*, p. 2) Section 144 of the Restatement of the Conflict of Laws and the same section of the latest tentative draft of the Second Restatement (No. 4, 1957) provide that "the law of the state of the child's domicile determines the right to its custody."

The leading California case is *Roche v. Roche*, 25 Cal. 2d 141, 152 P.2d 999, 1000 (1944). Therein the court quoted and approved the statement in *In re White*, 54 Cal. App. 2d 637, 640, 129 P.2d 706, 708 (1942):

> "The right of a parent to the care and custody of a child cannot be taken away merely because the Court may believe that some third person can give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody."

Again in *Stewart v. Stewart*, 41 Cal. 2d 447, 451, 260 P.2d 44, 47 (1953), the Court held:

> "Where a parent applying for custody is in a position to take the child and is not shown to be unfit, the Court may not award custody to strangers merely because it feels that they may be more fit or that they may be more able to provide financial, educational or other benefit."

In *Stewart* the Court stated unequivocally that the law of California contemplates that the care of a minor child

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7. This proposition is recognized in Iowa. *In re Skinner's Guardianship*, 230 Iowa 1016, 300 N.W. 1, 3 (1941); *In re Prehoda's Guardianship*, 194 Iowa 308, 189 N.W. 719 (1922); *Jenkins v. Clark*, 71 Iowa 552, 32 N.W. 504 (1887).

be awarded to a parent, if a fit and proper person, as against a stranger. As between a parent and a grandparent, the latter is a stranger to an action involving child custody and the parents' rights are paramount. *Morgan v. Morgan,* 217 Cal. App. 2d 535, 31 Cal. Rep. 682, 683 (1963).

It is the parent, not the grandparents, who has the right to companionship of his child. It is the parent, not the grandparents, who has the right to make decisions regarding his child's care and control, education, health and religion. *Lerner v. Superior Court,* 38 Cal. 2d 676, 681, 242 P. 2d 321, 323 (1952).

It is not a requisite for child custody that the parent at all times have been a paragon of virtue, thrift and industry. In *In re Green,* 192 Cal. 714, 221 P. 903, 906 (1923) the court held,

> "In addition to all this, it must be remembered that a parent, if competent, does not lose his right over his child merely because his conduct may at one time have fallen short of what may be described as 'ideal' ".

The law of California concerning parental right to custody of a minor son does not consider the social or economic acceptability of the religion espoused by the parent or his political beliefs; the right is not affected one way or the other by the fact that the parent comes or does not come from a "stable, dependable, conventional, middle-class, middle-west background"; it is not affected by whether the parent is or is not a college graduate. Nor is a California court entitled, in deciding the claims of a parent versus a non-parent, to consider that the non-parents' greater material possessions is a plus factor and the probability of intellectual stimulation by the parent is a minus factor. Under California law, and under the Constitution of the United States, such considerations are irrelevant as between parent and non-parent where the parent is not unfit.

Justice Traynor (now Chief Justice) in a concurring opinion in *Guardianship of Smith,* 42 Cal. 2d 91, 265 P. 2d 888, 891-892, (1954) carefully examined the California doctrine. The opinion states in relevant part:

> "The objection to the rule that custody must be awarded to the parent unless he is unfit carries the harsh implication that the interests of the child are subordinated to those of the parent when the trial court has found that the best interests of the child would be served by giving his custody to another. The heart of the problem, however, is how the best interests of the child are to be served. Is the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served? It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child. The rule requiring that custody be awarded to such a parent in preference to a stranger does not operate to subordinate the interests of the child to those of the parent; it merely serves to define the area of the parent's responsibility for the welfare of the child. The court's statutory duty to be 'guided by what appears to be for the best interests of the child in respect to its temporal and mental and moral welfare' (Prob. Code, § 1406) encompasses the view that the child's welfare is part of the responsibility of a fit parent.
>
> "One gains perspective by recalling that families are ordinarily allowed to function without outside interference though their wisdom in the upbringing of children may vary as widely as the physical heritage or economic advantages they give their children. Unless the upbringing of the child is so defective as to call for action by the juvenile court, it is unlikely that an outsider will challenge the parental custody or seek by legal process to prove that the child's welfare would best be served elsewhere. It is generally understood

that the stability of established family units would be jeopardized by outside interference.

"It is only when the family is dissolved by death, divorce or separation that conflicting claims to custody are likely to arise. If the parents are divorced and no third parties are involved, the court of necessity arbitrates whatever conflicting claims the parents may have to the custody of the childen. If one parent dies, however, or upon divorce is unable or unfit to have custody of a child, outsiders may enter the picture and attack the competence of the other parent to have custody or contend that the child would be better off with them. The problem may also arise if the parent awarded custody at the time of divorce dies or for other reasons is no longer able to care for the child, or if one or both parents have through necessity been unable for a time to care for the child themselves, but thereafter seek to regain custody from outsiders whose assistance they had solicited in the interim.

"Ordinarily in any of these circumstanees the determination of what course will best serve the interests of the child will involve the consideration of numerous imponderables. All things being equal, it is clear that the parent should have custody. All things are ordinarily not equal, however. The outsider may be able to offer the child greater material advantages. In the case of the death of the parent having custody after divorce, the child may be on more intimate terms with relatives or a new spouse of the deceased parent than with the other parent who has not had custody. If the child has not been in the custody of either parent he may have been successfully integrated into the home of the person who has been caring for him. The parent seeking custody may have remarried so that if custody is awarded to him, the child will be faced with the problem of adjusting to a stepparent. On the other hand, the importance of preserving the relationship between

a natural parent and his child cannot be gainsaid. . . . Moreover, even if the child is required to make some sacrifice to be with his natural parent or adjust to a new environment, it does not necessarily follow that his welfare will be correspondingly impaired. It may not be to the best interest of the child to have every advantage. He may derive benefits by subordinating his immediate interests to the development of a new family relationship with his own parent, by giving as well as receiving. Thus, although a change in custody from an outsider to a parent may involve the disruption of a satisfactory status quo, it may lead to a more desirable relationship in the long run.

". . . .

"Psychology is not an exact science. If expert testimony were introduced in cases such as this in all probability it would be in conflict. The ordinary judge as well as the ordinary parent lacks the omniscience accurately to evaluate all of the various considerations that may enter into a custody problem. 'The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and religion.' (*Lerner v. Superior Court,* 38 Cal. 2d 676, 681 [242 P.2d 321]) If a parent is fit he will be vitally concerned with the best interests of his child. By leaving to him the responsibility as to how those interests will be best served the court simply recognizes that 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters, supra,* [268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468]. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.' (*Prince v. Massachusetts,* 321 U.S. 158, 166 [64 S. Ct. 438, 88 L. Ed. 645].)"

The Iowa Court, departing from the law of California and applying its own standards to determine that the best interests of Mark Painter required that he be kept apart from his father in the home of his Iowa grandparents, has invaded the private realm of family life that under our system is meant to be sacrosanct. The invasion cannot, we believe, be justified under the United States Constitution, and the decision of the Iowa court should therefore be reviewed here.

CONCLUSION

For the foregoing reasons, the State of California urges that certiorari issue to review the decision of the court below.

Dated, San Francisco, California
September 15, 1966

Respectfully submitted,

THOMAS C. LYNCH
Attorney General

ELIZABETH PALMER
Deputy Attorney General

Attorneys for the State of California, Amicus Curiae

(Appendix A Follows)

Appendix A

CALIFORNIA MIGRATION 1955-1960
Department of Finance, Budget Division
Financial and Population Research Division
Sacramento 1964

NET MIGRATION TO CALIFORNIA BY STATE

TOTAL	1,122,204
Regions	
Northeast	223,946
North Central	473,899
South	259,759
West	164,600
Divisions	
New England	58,068
Middle Atlantic	165,878
East North Central	291,415
West North Central	182,484
South Atlantic	66,027
East South Central	44,200
West South Central	149,532
Mountain	77,149
Pacific	87,451
States	
Maine	3,377
New Hampshire	2,584
Vermont	2,261
Massachusetts	31,713
Rhode Island	7,506
Connecticut	10,627
New York	98,856
New Jersey	23,187
Pennsylvania	43,835
Ohio	68,630
Indiana	31,289
Illinois	100,020
Michigan	67,746
Wisconsin	23,730
Minnesota	32,969
Iowa	36,419
Missouri	36,719
North Dakota	9,741
South Dakota	11,663
Nebraska	23,734
Kansas	31,239
Delaware	699
Maryland	10,274
District of Columbia	7,636
Virginia	10,632
West Virginia	7,758
North Carolina	10,023
South Carolina	2,900
Georgia	7,598
Florida	8,507
Kentucky	8,449
Tennessee	16,000
Alabama	9,867
Mississippi	9,884
Arkansas	18,689
Louisiana	18,020
Oklahoma	29,170
Texas	83,653
Montana	9,222
Idaho	8,331
Wyoming	4,205
Colorado	24,566
New Mexico	12,425
Arizona	11,994
Utah	10,386
Nevada	−3,980
Washington	41,691
Oregon	29,254
Alaska	1,192
Hawaii	15,314

Source: U. S. Bureau of the Census. PC(2)-2B *Mobility for States and State Economic Areas*